(2)

No. 08-1540

FILED
JUL 16 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

FRED DIXON,

Petitioner,

v.

MIAMI-DADE COUNTY, FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

R. A. CUEVAS, JR.
MIAMI-DADE COUNTY ATTORNEY
LEE A. KRAFTCHICK
ASSISTANT COUNTY ATTORNEY
Counsel of Record
STEPHEN P. CLARK CENTER
111 N.W. 1ST STREET, SUITE 2810
MIAMI, FLORIDA 33128
PHONE: (305) 375-5151
FAX: (305) 375-5634
EMAIL: LAK2@miamidade.gov

Counsel for Respondent

July 16, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the lower court's decision affirming the dismissal of the plaintiff's §1983 action on statute of limitation grounds presents an important federal question, where the record shows that the plaintiff knew or should have known of his alleged injury more than four years before he filed this action?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CITATIONS iii

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

1. THE PETITION MISCHARACTERIZES THE LOWER COURTS' DECISIONS. 6

2. THE PETITION RAISES ISSUES THAT WERE NOT RAISED BELOW. 8

3. THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE DOES NOT DIRECTLY CONFLICT WITH ANY DECISION OF ANOTHER CIRCUIT COURT AND DOES NOT PRESENT ANY IMPORTANT FEDERAL QUESTION. 9

4. THE LOWER COURTS' DECISIONS DO NOT SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER. 11

CONCLUSION 13

TABLE OF CITATIONS

PAGE(S)

CASES

Cao v. Puerto Rico,
525 F.3d 112 (1st Cir. 2008) 9

Digioia v. H. Koch & Sons,
944 F.2d 809 (11th Cir. 1991) 12

Harris v. City of New York,
186 F.3d 243 (2d Cir. 1999) 9

Izaak Walton League of America, Inc. v. Kimbell,
558 F.3d 751 (8th Cir. 2009) 10

Klehr v. A.O. Smith Corp.,
521 U.S. 179 (1997) 8

Morales v. City of Los Angeles,
214 F.3d 1151 (9th Cir. 2000) 10

Mullinax v. McElhenney,
817 F.2d 711 (11th Cir. 1987) 10

Price v. City of San Antonio,
431 F.3d 890 (5th Cir. 2005) 9

Ruff v. Runyon,
258 F.3d 498 (6th Cir. 2001) 10

Sameric Corp. of Del. v. City of Phila.,
142 F.3d 582 (3d Cir. 1998) 9

Savory v. Lyons,
469 F.3d 667 (7th Cir. 2006), *cert. denied* 550 U.W. 960 (2007) 10

Sawtell v. E.I. du Pont de Nemours and Co., Inc.,
22 F.3d 248 (10th Cir.), *cert. denied* 513 U.S. 917 (1994) 10

Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co., 549 U.S. 443 (2007) 9

United States v. Kubrick,
444 U.S. 111 (1979) 8

Urie v. Thompson,
337 U.S. 163 (1949) 8

Wallace v. Kuto,
549 U.S. 384 (2007) 8

OTHER AUTHORITIES

28 U.S.C. § 1254 1

42 U.S. C. § 1983 . . . . . 9, 10

Fed. R. Civ. P. 16 4

Fed. R. Civ. P. 56(f) 11, 12

Fed. R. Civ. P. 59(e) 5

Fed. R. Civ. P. 60(a) 5

Fed. R. Civ. P. 60(b)(3) 5

Sup. Ct. R. 10 6

S.D. Fla. Local R. 7.1 . . . . . 5, 12

S.D. Fla. Local R. 7.5 . . . . . 5, 12

S.D. Fla. Local R. 16.1 4

§ 8-5, Miami-Dade County Code 1

§ 8-5(l), Miami-Dade County Code 2

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254.

STATEMENT OF THE CASE

The Petitioner (Plaintiff and Appellant below), Fred Dixon, has not accurately described the facts or the proceedings below. To correct any misimpression Dixon's statement may have left, the Respondent, Miami-Dade County, offers the following statement of the case and facts.

This action began with a multi-count complaint, alleging an unlawful taking under the Fifth Amendment, unlawful search and seizure under the Fourth Amendment and a violation of substantive due process under the Fourteenth Amendment, all in connection with the Miami-Dade County Building Department's inspection and demolition of a building owned by Dixon. D.E. 1, *Complaint.* Dixon alleged that sometime "in the summer of 2000" inspectors from the County's Building Department went upon his property without his permission and subsequently notified him that his building was unsafe pursuant to the provisions of the South Florida Building Code. D.E. 19, *Amd. Comp.* ¶¶ 6-9. The inspectors advised Dixon that his building would be demolished if certain repairs were not made. *Id.* ¶ 9.

On December 20, 2000, the County's Unsafe Structures Board, pursuant to Miami-Dade County Code § 8-5, conducted a hearing regarding the status of Dixon's building. *Id.* at ¶ 10. Dixon received written notice of the hearing and appeared at the appointed time. D.E. 59, *Dixon Dep.* at 128. At the hearing, a

County building inspector presented documents and photographs to show that the building was vacant, unguarded, and missing all its windows, and that it had inoperable plumbing, exposed electrical wires and unsanitary conditions. *See* D.E. 58, *Exhibit* 1 (Unsafe Structure Board Minutes) at 5-6; and D.E. 61, *Exhibit* 2 (Case Resume, with photographs).

Dixon spoke with the building inspector and learned that the County had inspected the interior as well as the exterior of his building without his consent. D.E. 59, *Dixon Dep.* at 103-147. As soon as he heard the inspector describe the building and the inspections, Dixon knew that his constitutional rights had been violated. *Id.* at 103-106.

Upon consideration of the evidence presented at the hearing, the Board determined that Dixon's property was unsafe and ordered him to make certain repairs or risk demolition. D.E. 36, *Exhibit* 1, *2nd Amd. Comp.* ¶ 9; D.E. 58, *Exhibit* 4 (Notice of Board Decision). The Board sent Dixon written notice of its decision, advising him that if the required repairs were not made, his building would be demolished. *Id.* The Building Code provides for judicial review of Board decisions, but Dixon chose not to pursue an appeal in state court. *Miami-Dade County Code* § 8-5(l).

Between December 26, 2000 and July 19, 2001, employees of the Miami-Dade County Building Department inspected Dixon's building on at least nine occasions to determine if the required repairs had been made. D.E. 36, *Exhibit* 1, *2nd Amd. Comp.* ¶ 9. On February 7, 2001, the Building Department sent Dixon a letter notifying him that his building would be demolished for non-compliance with the Unsafe

Structures Board's order to repair his building. D.E. 58, *Exhibit* 5; *see* D.E. 36, *Exhibit* 1, *2nd Amd. Comp.* ¶ 14. On March 9, 2001, the Building Department sent Dixon a "final notice" of non-compliance and advised him that the County would engage the services of a contractor to demolish his building. D.E. 58, *Exhibit* 6. Dixon did not respond to any of the Board's orders or the Department's letters, and on August 10, 2001, the Building Department demolished his building. D.E. 36, *Exhibit* 1, *2nd Amd. Comp.* ¶ 14.

On August 2, 2005, more than four years after the County last inspected his property on July 19, 2001, Dixon filed this action alleging violations of the Fourth Amendment, the Fifth Amendment "takings" clause and the Fourteenth Amendment due process clause. D.E. 1, *Complaint.* The County moved to dismiss for lack of jurisdiction and failure to state a claim for relief. D.E. 4; D.E. 13. The district court dismissed Dixon's takings claim for lack of subject matter jurisdiction because the complaint did not allege that Dixon exhausted the State's remedies for governmental takings or that those remedies were constitutionally inadequate, and his claim was therefore not ripe. D.E. 18, *Order Dismissing Complaint Without Prejudice* at 2; D.E. 33, *Order Granting Motion to Dismiss Without Prejudice* at 5. The court dismissed the substantive due process claim because the "substantive component of the due process clause cannot be used to enforce property rights in connection with the condemnation and destruction of a building." D.E. 33 at 6. The court dismissed the Fourth Amendment claim to the extent it involved the demolition of Dixon's property because it found that the County's extensive pre-demolition notice, hearing and review procedures showed that the County's

policies were reasonable as a matter of law. *Id.* The district court dismissed the Fourth Amendment challenge to the County's pre-demolition inspections of Dixon's property on statute of limitations grounds because the last inspection occurred on July 19, 2001, more than four years before Dixon filed the complaint, but granted Dixon leave to amend this portion of his complaint. *Id. See also* D.E. 46.

Dixon amended his complaint to allege that even though his property was demolished in August 2001, he did not learn that the County inspected the property until sometime in March 2002. The court found the amended complaint sufficient to state a claim under the Fourth Amendment and directed the parties to complete discovery. *Id.* During the course of discovery, the County repeatedly asked Dixon to produce any and all documents that supported his claims and to identify any potential witnesses. D.E. 62. Despite numerous requests and extensions, Dixon did not produce any documents or identify any witnesses; indeed, Dixon wholly ignored his obligations to produce initial discovery under Fed. R. Civ. P. 16, Local Rule 16.1 and the district court's scheduling order, as well as the County's interrogatories and other specific discovery requests. *Id.* Unable to obtain documents through its written requests, the County set Dixon down for deposition. D.E. 59, *Dixon deposition*.

After taking Dixon's deposition and discovering that he learned of the inspections of his property by no later than December 20, 2000, the County moved for summary judgment on the ground that Dixon's remaining claim was outside the four-year statute of

limitations.[1] D.E. 56. Under Southern District of Florida Local Rules 7.1 and 7.5, Dixon was required to respond within 10 days. Dixon requested a lengthy extension of time, but even after that time expired, he still did not file a response. D.E. 63. The County then moved for summary judgment by default. D.E. 65. Dixon did not respond to that motion either. The district court declined to grant summary judgment by default and instead proceeded to consider the merits of the motion, ultimately granting summary judgment dismissing the remaining Fourth Amendment claim on statute of limitation grounds. D.E. 66, *Order Granting Motion for Final Summary Judgment*. The court found that "Dixon's deposition testimony establishes beyond any doubt" that he "knew or had reason to know" of the inspections "by December 20, 2000 at the latest." *Id.* at 3. Because he did not file this action until more than four years later, the court concluded, it was barred by the statute of limitations. *Id.*

After the court issued its decision, Dixon filed three motions under Rules 59(e), 60(a) and 60(b) (3) seeking relief from, or reconsideration of, the court's order granting summary judgment. D.E. 68, 70, 71. Dixon protested that the court had granted summary judgment prematurely because his deposition had not been completed, but he offered no explanation for why he did not respond to the motion for summary judgment before it was granted. *Id.* The district court denied the motions because Dixon failed to show that

---

[1] Dixon complains that his deposition was not complete at the time the County moved for summary judgment, but the only reason it was not complete is that he cancelled it at the last minute and failed to reset it before the close of discovery.

the court's decision was the result of oversight, manifest error or fraud. D.E. 79.

Dixon appealed to the Eleventh Circuit Court of Appeals. In a brief, unpublished opinion, the Eleventh Circuit affirmed the dismissal of the due process and taking claims because Dixon was "afforded full process insofar as the determination of the unsafe conditions of his building was concerned and that the process included sufficient evidence to support that determination." App. 2a. The court affirmed the dismissal of Dixon's Fourth Amendment claim because the record showed that "the inspection, if it occurred as [Dixon] described, had taken place more than four years prior to the action, so the statute of limitations had run and the claim is time-barred." *Id.*

REASONS FOR DENYING THE WRIT

There are several reasons for denying this petition for writ of certiorari. First, it is premised on a mischaracterization of the lower courts' decisions. Second it raises legal issues that were never raised below. Third, it does not raise any important federal issue. And, fourth, the lower court's decisions do not "so far depart from the accepted and usual course of judicial proceedings . . . as to call for exercise of this court's supervisory power." Sup. Ct. Rule 10.

1. THE PETITION MISCHARACTERIZES THE LOWER COURTS' DECISIONS.

The Petitioner asks this Court to review the lower courts' decisions to determine if they correctly held that his claims were barred by the applicable four-year statute of limitations. He argues that although he

may have known about the allegedly illegal inspections of his property that took place *before* the Unsafe Structures Board hearing of December 20, 2000, he did not know about the inspections that took place *after* that hearing. He argues that the lower courts "unfairly imputed" knowledge of the post-hearing inspections to him. *Petition* at 21. In fact, all the lower courts did was hold that since Dixon admitted knowledge of the pre-hearing inspections and the Unsafe Structures Board's order to repair or demolish, he either knew or should have known of the post-hearing inspections. Once he was told on December 20 that his property was to be demolished if it was not repaired, any reasonable person would have known that it would be inspected after that date to determine if the required repairs were made.

All of the County's inspections of Dixon's property took place between February 2000 and July 2001, well outside the four year statute of limitations. Dixon originally alleged that *all* of his Fourth Amendment claims were timely, both those involving the pre-hearing inspections and those involving the post-hearing inspections. *See* D.E. 36, *Exhibit 1, 2nd Amd. Comp.* ¶ 7. On appeal to the Eleventh Circuit, however, he conceded for the first time that he was sufficiently aware of the ***pre***-hearing inspections in December 2000 to start the statute of limitations running on those claims. He argued, however, that he was not aware of the ***post***-hearing inspections of his property until some time in March 2002.

As the lower courts recognized, however, for Dixon to argue that he was subjectively unaware of the post-hearing inspections was not sufficient to avoid summary judgment. Subjective, personal knowledge of

the facts giving rise to a cause of action is not required to start a statute of limitations running. As this Court has explained, a statute of limitations generally begins to run from the date the plaintiff knew or should have known in the exercise of "due diligence" the facts supporting a cause of action. *Klehr v. A.O. Smith Corp.*. 521 U.S. 179, 196 (1997). If Dixon had exercised due diligence after the December 20 hearing, he certainly would have known of the inspections of his property. Instead, he ignored the Unsafe Structures Board's orders to repair his property, its notices of imminent demolition, and the demolition itself.

It is undisputed that Dixon was aware of the pre-hearing inspections and the Board's repair or demolish order. The lower courts held that on these facts, it should have been apparent to Dixon that the Building Department would continue to inspect his property to see if the ordered repairs were made and to enter his property to destroy it if they were not. The lower courts properly concluded that Dixon should have known of the post-hearing inspections as soon as they occurred and that the statute of limitations began to run from the date of the inspections.

2. THE PETITION RAISES ISSUES THAT WERE NOT RAISED BELOW.

The Petitioner argues that review is necessary because the decision below "violates" this Court's decisions in *Wallace v. Kuto*, 549 U.S. 384 (2007); *United States v. Kubrick*, 444 U.S. 111 (1979) and *Urie v. Thompson*, 337 U.S. 163 (1949). *Petition* at 16. None of these cases was even cited below, let alone addressed by the lower courts. This Court "ordinarily do[es] not consider claims that were neither raised nor

addressed below." *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 455 (2007).

3. THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE DOES NOT DIRECTLY CONFLICT WITH ANY DECISION OF ANOTHER CIRCUIT COURT AND DOES NOT PRESENT ANY IMPORTANT FEDERAL QUESTION.

The Petitioner has not suggested that the lower court's decision is in conflict with the decision of any other circuit. Nor does this case otherwise raise an important federal issue. The lower courts simply held that the action is barred by the statute of limitations because Dixon should have known of the post-hearing inspections of his property when they occurred. The circuit courts uniformly agree that the statute of limitations in §1983 actions begins to run from the date the plaintiff knew or should have known of the injury upon which the action is based. *See, e.g., Cao v. Puerto Rico*, 525 F.3d 112, 115 (1st Cir. 2008) ("Under federal law, a § 1983 statute of limitations ordinarily accrues when the aggrieved person knows, or has reason to know, of the injury on which the action is based."); *Harris v. City of New York,* 186 F.3d 243, 248 (2d Cir. 1999) (statute of limitations for §1983 action began to run when plaintiff "knew or should have known of his injury"); *Sameric Corp. of Del. v. City of Phila.,* 142 F.3d 582, 599 (3d Cir. 1998) ("A section 1983 cause of action accrues when the plaintiff knew or should have known of the injury upon which its action is based."); *Price v. City of San Antonio,* 431 F.3d 890, 893 (5th Cir. 2005) ("[A] cause of action under section 1983 accrues when the plaintiff knows or

has reason to know of the injury which is the basis of the action."); *Ruff v. Runyon,* 258 F.3d 498, 500 (6th Cir. 2001) (the statute of limitations begins to run under federal law "when plaintiffs knew or should have known of the injury which forms the basis of their claims"); *Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006) ("Section 1983 claims accrue when the plaintiff knows or should know that his or her constitutional rights have been violated."), *cert. denied* 550 U.S. 960 (2007); *Izaak Walton League of America, Inc. v. Kimbell*, 558 F.3d 751, 759 (8th Cir. 2009) (A "claim 'accrues' . . . when the plaintiff either knew, or in the exercise of reasonable diligence should have known, that he or she had a claim."); *Morales v. City of Los Angeles*, 214 F.3d 1151, 1154 (9th Cir. 2000) ("[U]nder federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action."); *Sawtell v. E.I. du Pont de Nemours and Co., Inc.*, 22 F.3d 248, 251 (10th Cir.) (A "cause of action begins to accrue when the injured person knew, or by the exercise of reasonable diligence should have discovered, the defect or the cause of the injury."), *cert. denied* 513 U.S. 917 (1994); *Mullinax v. McElhenney* 817 F.2d 711, 716 (11th Cir. 1987) (A section 1983 action accrues when "the plaintiff knows or has reason to know that he has been injured.").

The decision in this case was a straightforward application of the uncontroversial principle that the statute of limitations in a §1983 action begins to run when the plaintiff knew or should have known through the exercise of due diligence that he has been injured. Dixon certainly should have known his property would be inspected once he was told that the property had to be repaired or demolished.

4. THE LOWER COURTS' DECISIONS DO NOT SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Dixon argues, finally, that certiorari should be granted because he did not have a fair opportunity to respond to the County's motion for summary judgment. He argues that the district court ruled on the County's motion for summary judgment before he responded to the motion and before his deposition was completed. The only reason the district court ruled before Dixon responded is that he did not respond in the time allotted by the court and never requested a delay in ruling under Rule 56(f). Even if he had requested a delay, it would not have made any difference because a delay would not have changed his own adverse and dispositive testimony.

This case was filed in August 2005, and was pending for nearly two and one-half years before the district court ruled on the County's motion for summary judgment. By the time the County filed its motion, the district court had already dismissed the majority of Dixon's claims for lack of jurisdiction and failure to state a claim. The only portion of the complaint the court permitted to proceed to discovery was Dixon's contention that the pre-demolition inspections of his property violated the Fourth Amendment. The court originally gave the parties until October 19, 2007 to complete discovery, but extended that deadline to November 16, 2007 at Dixon's request. The County filed its motion for summary judgment after the close of discovery.

After taking Dixon's deposition and discovering that he was aware of the inspections of his property by no later than December 20, 2000, the County moved for summary judgment on the ground that Dixon's Fourth Amendment claim was outside the four year statute of limitations. Under Southern District of Florida Local Rules 7.1 and 7.5, Dixon was required to respond within 10 days. *See, e.g., Digioia v. H. Koch & Sons*, 944 F.2d 809, n.4 (11th Cir. 1991). Dixon requested a lengthy extension of time, but even after that time expired, he still did not file a response. D.E. 63. The County then moved for summary judgment by default. D.E. 65. Dixon did not respond to that motion either. At no time did Dixon seek relief under Rule 56(f). The district court declined to grant summary judgment by default and instead proceeded to consider the merits of the motion, reviewed the entire record, and ultimately granted summary judgment dismissing the remaining Fourth Amendment claim on statute of limitation grounds for the reasons explained above. D.E. 66.

After the court issued its decision, Dixon filed a series of motions for rehearing. D.E. 68, 70, 71. Dixon protested that his deposition was never completed, but completion of his deposition would not have helped his case. Upon reconvening the deposition, he could not simply change his adverse testimony to something more favorable to his position.

Ultimately, Dixon was not entitled to a delay for the simple reason that he never requested one. Even if he had, he could not show that a postponement would have enabled him to produce evidence sufficient to create a genuine issue of material fact as to when he knew or should have known about the inspections of

his property. The district court did not abuse its discretion in refusing to postpone a ruling on summary judgment under these circumstances.

CONCLUSION

The Petition for Writ of Certiorari should be denied. The Petitioner has not shown that this case raises any important federal issue warranting this Court's review.

Respectfully submitted,

R. A. CUEVAS, JR.
Miami-Dade County Attorney
Lee A. Kraftchick
Assistant County Attorney
Counsel of Record
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128
Phone: (305) 375-5151
Fax: (305) 375-5634
Email: LAK2@miamidade.gov
Counsel for Respondent

July 16, 2009